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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

THE STATE OF NEBRASKA, COMPLAINANT,

vs.

THE STATE OF WYOMING, DEFENDANT,

and

THE STATE OF COLORADO, IMPLEADED DEFENDANT,

THE UNITED STATES OF AMERICA, INTERVENOR.

FORM OF DECREE PROPOSED BY THE STATE OF WYOMING, DEFENDANT, THE STATE OF COLORADO, IMPLEADED DEFENDANT, AND THE UNITED STATES OF AMERICA, INTERVENOR.

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OCTOBER TERM, 1945

No. 6 Original

THE STATE OF NEBRASKA, COMPLAINANT,

vs.

THE STATE OF WYOMING, DEFENDANT,

and

THE STATE OF COLORADO, IMPLEADED DEFENDANT,

THE UNITED STATES OF AMERICA, INTERVENOR.

FORM OF DECREE PROPOSED BY THE STATE OF WYOMING, DEFENDANT, THE STATE OF COLORADO, IMPLEADED DEFENDANT, AND THE UNITED STATES OF AMERICA, INTERVENOR.

I.

INTRODUCTION

The State of Wyoming, defendant, the State of Colorado, impleaded defendant, and the United States of America, intervenor, jointly submit herewith a proposed form of decree in the above case. This action is taken under the permission contained in the concluding paragraph of the opinion of the Court announced June 11, 1945.

The parties making this proposal have heretofore re-

ceived a copy of the form of decree proposed by the State of Nebraska, complainant. Conferences had previously indicated the impossibility of an agreement between these parties and Nebraska on certain decretal provisions. Following the proposed form of decree herein there appears an explanatory statement covering those matters of substance on which these parties have been unable to agree with Nebraska.

II.

PROPOSED FORM OF DECREE

This cause having been heretofore submitted on the report of the Special Master and the exceptions of the parties thereto, and the Court being now fully advised in the premises:

It is ordered, adjudged and decreed that:

I. The State of Colorado, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River and its tributaries for the irrigation of more than a total of 135,000 acres of land in Jackson County, Colorado, during any one irrigation season;

(b) From storing or permitting the storage of more than a total amount of 17,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries in Jackson County, Colorado, between October 1 of any year and September 30 of the following year;

(c) From exporting out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, to any other stream basin or basins more than 60,000 acre feet of water in any period of ten consecutive years reckoned in continuing progressive series beginning with October 1, 1945.

II. Exclusive of the Kendrick Project and Seminoe

Reservoir the State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River above the Guernsey Reservoir and from the tributaries entering the North Platte River above the Pathfinder Dam for the irrigation of more than a total of 168,000 acres of land in Wyoming during any one irrigation season;

(b) From storing or permitting the storage of more than a total amount of 18,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries above the Pathfinder Reservoir between October 1 of any year and September 30 of the following year.

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe and Alcova Reservoirs otherwise than in accordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;

Second, Guernsey Reservoir;

Third, Seminoe Reservoir; and

Fourth, Alcova Reservoir;

Provided, however, that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the use of water for irrigation purposes.

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water

in Pathfinder, Guernsey, Seminoe or Alcova Reservoirs, and from the diversion of natural flow water through the Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjudged to be senior to said four reservoirs and said Casper Canal, and which said Nebraska appropriations are hereby identified and defined, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	Canal	Limitation in Sec. Feet	Seasonal Limitation in Acre Ft.
Tract of 1025 acres	French	15	2,737
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

Provided, however, that the restrictions of this paragraph shall not apply: (1) when the said canals have each received during the season May 1 to September 30, inclusive, from any and all sources an amount of water equal to the seasonal acre foot limitations appearing in the above table; (2) when, and to the extent that, the said canals for any reason whatsoever are not using or diverting water within the above stated second foot and acre foot limitations and applying such water to beneficial use; and (3) to the re-storage of storage water released from any upstream reservoir.

V. The natural flow water in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate

from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to this apportionment, provided that in the apportionment of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transportation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula taken from United States' Exhibit 204A:

Reservoir Evaporation Losses.

Seminoe, Pathfinder and Alcova Reservoirs.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class "A" pan located at Pathfinder reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by co-efficient of 70% to reduce pan record to open water surface.

Guernsey Reservoir.

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder reservoir for the period 1921 to 1939, inclusive, using a co-effi-

cient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	Area Acres	Daily Loss—Second Feet May	June	July	Aug.	Sept.
Alcova to Wendover....	8360	53	76	87	76	56
Guernsey Res. to Whalen.	560	4	5	6	5	4
Whalen to State Line....	2430	16	22	25	22	16

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft.; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of 70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Pathfinder dam to head of Alcova reservoir (area 170 acres) because this area is less than submerged area of original river bed in Alcova reservoir and is, therefore, considered as off-set.

Likewise the area between Seminoe dam and head of Pathfinder reservoir is less than area of original river bed through Pathfinder reservoir—considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used as may

be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agreement, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.

VI. The State of Nebraska has no equitable claim upon, and is not entitled to water originating above Tri-State Dam for uses served by diversions below said Dam, and this Decree shall be so administered that water from above Tri-State Dam shall not be conveyed beyond that point for use or diversion below said Dam, provided, however, that Nebraska shall be entitled to make such use as may be desired of water unavoidably passing said Dam.

VII. An apportionment of natural flow only is made by this Decree, and the Court assumes that an apportionment of storage water is unnecessary to prevent a recurrence of the practice of making diversions in excess of requirements.

VIII. Such additional gauging stations and measuring devices at or near the Wyoming-Nebraska state line, if any, as may be necessary for making any apportionment herein decreed, shall be constructed and maintained at the joint and equal expense of Wyoming and Nebraska to the extent that the costs thereof are not paid by others.

IX. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from diverting or permitting the diversion of water from the North Platte or its tributaries at or above Alcova Reservoir in lieu of or in exchange for return flow water from the Kendrick Project reaching the North Platte River below Alcova Reservoir.

X. The State of Wyoming and the State of Colorado be and they hereby are each required to prepare and maintain complete and accurate records of the total area of land irrigated and the storage and exportation of the water of the North Platte River and its tributaries within those

portions of their respective jurisdictions covered by the provisions of paragraphs I and II hereof, and such records shall be available for inspection at all reasonable times; provided, however, that such records shall not be required in reference to the water uses permitted by paragraph XI hereof.

XI. This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal, recreational and stock watering purposes and consumption.

XII. For the purposes of this decree:

(a) "Season" or "seasonal" refers to the irrigation season, May 1 to September 30, inclusive;

(b) The term "storage water" as applied to releases from reservoirs owned and operated by the United States is defined as any water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet natural flow uses permitted by this decree;

(c) "Natural flow water" shall be taken as referring to all water in the stream except storage water;

(d) Return flows of the Kendrick Project shall be deemed to be "natural flow water" when they have reached the North Platte River, and subject to the same diversion and use as any other natural flow in the stream.

XIII. This decree shall not affect:

(a) The relative rights of water users within the State of Colorado.

(b) Such claims as the United States has to storage water under Wyoming law nor in any way interfere with the ownership and operation by the United States of the various federal storage and power plants, works and facilities.

(c) The use or disposition of any additional supply or supplies of water which in the future may be imported into the basin of the North Platte River from the water shed of an entirely separate stream, and which presently do not enter said basin, or the return flow from any such supply or supplies.

(d) The apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River;

(e) The apportionment made by the compact between the States of Nebraska and Colorado, apportioning the water of the South Platte River.

XIV. Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:

(a) The question of the applicability and effect of the Act of August 9, 1937, 50 Stat. 564, 595, upon the rights of Colorado and its water users when and if water hereafter is available for storage and use in connection with the Kendrick Project in Wyoming.

(b) The question of the effect upon the rights of upstream areas of the construction or threatened construction in downstream areas of any projects not now existing or recognized in this decree;

(c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;

(d) The question of the right to divert at or above the headgate of the Casper Canal any water in lieu of, or in exchange for, any water developed by artificial drainage to the river of sump areas on the Kendrick Project;

(e) Any question relating to the joint operation of Pathfinder, Guernsey, Seminoe and Alcova Reservoirs whenever changed conditions make such joint operation possible.

(f) Any change in conditions making modification of the decree or the granting of further relief neccessary or appropriate.

XV. The costs in this cause shall be apportioned and paid as follows: the State of Colorado one-fifth; the State of Wyoming two-fifths; and the State of Nebraska two-fifths. Payment of the fees and expenses of the Special Master has been provided by a previous order of this Court.

III.

EXPLANATORY STATEMENT

This explanatory statement is intended to cover only those matters of substance on which the parties making this proposal are in disagreement with Nebraska. In view of the fact that there is complete accord on the general form and style, reference will be made only to differences affecting substantive provisions. The Nebraska proposal will hereafter be identified by the word "Nebraska" and the proposal of the parties hereto by the word "Joint"

A.

NEBRASKA PARAGRAPH I (B)
JOINT PARAGRAPH I (B)

1. The figure of "17,060" appearing in the second line of this paragraph as proposed by Nebraska is apparently

a typographical error. The correct figure which conforms to the opinion of the Court, p. 24, and the Master's Report, p. 177, is "17,000."

2. The Joint proposal includes, and the Nebraska proposal omits, in the forepart of this paragraph after the word "water" the phrase "for irrigation purposes." This phrase is appropriate and necessary for the following reasons:

(a) The issues made up by the pleadings in this case only involved water uses for irrigation purposes, and the Court specifically states (Opinion p. 1) that "the controversy pertains to the use for irrigation purposes of the water of the North Platte River, a nonnavigable stream."

(b) If this phrase is omitted, Paragraph IX Nebraska Proposal—Paragraph X Joint proposal—would require records of storage in stock ponds, municipal water tanks, and fish ponds.

(c) If this phrase is omitted, there is an inconsistency with Nebraska Paragraph X — Joint Paragraph XI.

B.

NEBRASKA PARAGRAPH I (C)
JOINT PARAGRAPH I (C)

The Joint Proposal uses the language "any period of 10 consecutive years reckoned in continuing progressive series beginning with." This phrase is taken from the Colorado River Compact executed in 1922 and has well understood significance. The Nebraska proposal adds an explanatory provision which does not clarify and which may confuse.

C.

NEBRASKA PARAGRAPH II (A)
JOINT PARAGRAPH II (A)

The Nebraska proposal in the second line following the word "water" inserts the phrase "in Wyoming." The Joint proposal places the quoted phrase after the word "land" near the close of the paragraph. This phrase is more appropriate at the point suggested by the Joint proposal because the purpose of the paragraph is to limit the irrigated acreage in the designated area. The position of the phrase in the Nebraska proposal would permit the irrigation of more than the stated amount of land by diversions from the stream in Colorado for use in Wyoming.

D.

NEBRASKA PARAGRAPH II (B)
JOINT PARAGRAPH II (B)

The Joint proposal includes, and the Nebraska proposal omits, in the forepa. of this paragraph after the word "water" the phrase "for irrigation purposes." The comments under A (2) above apply here.

E.

NEBRASKA PARAGRAPH III
JOINT PARAGRAPH III

The difference here is found in the concluding clause of the proviso. Attention is directed to the following:

1. Nebraska employs the phrase "administration of water" instead of "use of water." It is the use of the supply, not its administration, which should be protected.

2. As provided in the Joint proposal, the permitted storage and release for power purposes, contrary to the rule of priority operation, can be such only as will not materially interfere with the use of water for irrigation

purposes. This includes all down stream irrigation use, both in Wyoming and for the Nebraska State Line and French Canals. Wyoming appropriators are entitled to the same protection as those in Nebraska. To confine the benefit of the restriction to the Nebraska canals, as is proposed by Nebraska, does not accord equal treatment to both states.

F.

NEBRASKA PARAGRAPH IV
JOINT PARAGRAPH IV

The Joint proposal includes, and Nebraska proposal omits, the provisos following the table. Attention is directed to the following:

1. The limitations of the French and Nebraska State Line canals can be made fully effective only by the inclusion of provisos 1 and 2 in the decree. The very purpose of the specified limitations is to define the rights of these canals to use or divert water, and as so defined to fix their rights in relation to storage in the reservoirs and diversion by the Kendrick Project.

2. Both the Master's Report (Report pp. 136-143, 177-178) and the opinion of the Court (Opinion p. 30) permit storage by the named reservoirs and diversion by the Casper Canal under the conditions stated in provisos (1) and (2). The use or diversion by the State Line canals can not rise above the fixed requirements which measure their needs. No reason is perceived why they should be permitted to divert water beyond requirements or when not required for beneficial use, and without provisos 1 and 2 this might occur, or at least the decree will not be clear and definite.

3. As to proviso (3), water is ofttimes released from an upstream reservoir and for a variety of reasons cannot be immediately used when it reaches a downstream reser-

voir. It is certainly not contemplated that the restorage of such water is prohibited.

G.

NEBRASKA PARAGRAPH V
JOINT PARAGRAPH V

One difference between the two proposals in regard to this paragraph is that the Nebraska form contains an injunction against the diversion or use of water by Wyoming contrary to the apportionment. The Joint proposal contains an injunction against both Nebraska and Wyoming.

To effectuate an apportionment there must be an injunction which will compel each state to comply with the decreed division of water. The decree should not be so drawn as to permit violation by one party, while compelling observance by the other. Equal treatment requires the same provisions for observance of the Decree by Nebraska as are imposed upon Wyoming.

In the Guernsey to Tri-State Dam section of the stream, in which the percentage apportionment applies, Nebraska makes diversions for the Mitchell, Gering, Tri-State, Northport and Ramshorn. Nebraska is also given the right to designate what portion of its share shall be diverted in Wyoming for the Interstate, Fort Laramie, French and Mitchell canals and is thereby granted control over the diversion of water in Wyoming. The same injunctive restraint upon Nebraska as is imposed upon Wyoming is entirely justified.

After the statement of the formula for determination of reservoir evaporation and river carriage losses, the Nebraska proposal contains the statement that the time interval for the passage of water shall be such as may be agreed upon by Nebraska, Wyoming, and the United States. The Joint proposal adds to the language employed by Nebraska the statement that in the absence of such an agreement the time interval shall be such as is determined

from day to day by the manager of the Government reservoirs. The time interval is a variable factor. The parties are not in agreement. In the absence of agreement, authority must be vested in someone to make the determination. In the past the manager of the Government reservoirs has made such determination.

If the Joint proposal is not to be adopted, then the paragraph in the Nebraska form following the statement of the formula should be omitted as its effect will be to recognize a problem but fail to furnish any solution.

H.

JOINT PARAGRAPH VI

Nebraska has no provision in its proposed decree comparable to Paragraph VI of the Joint form. By this paragraph the Joint proposal completes the apportionment between Wyoming and Nebraska by providing that Nebraska is not entitled to water originating above Tri-State Dam for uses served by diversions below that dam, except that Nebraska is entitled to use water unavoidably passing that dam.

This is in conformity with the report of the Master. We quote from paragraph numbered 5 on Page 9 of the Master's Report:

> "Lands in Nebraska supplied by diversions below the so called Tri-State Dam have not equitable claim upon direct flow water originating in Wyoming or Colorado. This results from the fact that their needs are reasonably satisfied from local sources of supply."

This conclusion of the Master was confirmed by the Court. (See Opinion, pp. 30, 51.)

Paragraph V in each proposal apportions only natural flow water in the Guernsey Dam to Tri-State Dam section. For the decree to be complete it is essential that provision

be made relative to the claims of Nebraska users diverting below Tri-State for water from upstream areas. In other words, without a provision, such as Paragraph VI of the Joint proposal, there is nothing in the decree to prevent Nebraska, or one of its canals diverting below Tri-State, from demanding that upstream water be passed below Tri-State Dam.

I.

NEBRASKA PARAGRAPH VI
JOINT PARAGRAPH VII

This paragraph in each proposal deals with the proposition that the decree apportions only natural flow. The second sentence of the Nebraska paragraph is unnecessary.

Discussing apportionment of storage water, the Court, after reference to excessive diversions, said:

> "We can not assume that an apportionment of storage water is necessary to prevent a recurrence of those practices." (Opinion, p. 39)

The language employed in the concluding clause of paragraph VII of the Joint proposal is taken directly from the Court's opinion. Without giving the basis of the Court's conclusion, any statement that the decree apportions natural flow only is incomplete and can only lead to misunderstanding.

J.

NEBRASKA PARAGRAPH IX.
JOINT PARAGRAPH X

The difference between the parties here is that under the Joint proposal the provision suggested by Nebraska is followed by this proviso: "Provided, however, that such records shall not be kept in reference to water uses permitted by Paragraph XI hereof." Inasmuch as the Court

does not place any limitation on such uses (Opinion p. 52), there is no need for the keeping of records thereof.

K.

NEBRASKA PARAGRAPH X
JOINT PARAGRAPH XI

The Joint proposal differs from that of Nebraska in that after the word "municipal" near the end of Joint paragraph XI the word "recreational" in inserted. The portion of the North Platte Basin above Pathfinder Reservoir in both Wyoming and Colorado is a wild life area visited by many sportsmen and vacationists in the summer period. Numerous small ponds have been constructed to aid in the propagation and preservation of fish and wild life. It seems but right to exempt these from the provisions of the decree.

L.

NEBRASKA PARAGRAPH XII

The Joint proposal contains no counterpart to Nebraska Paragraph XII. The matter contained in the Nebraska proposal is a finding by the Court, and it is neither necessary nor appropriate to insert it in the decree.

M.

NEBRASKA PARAGRAPH XIII (A)
JOINT PARAGRAPH XIII (A)

The difference between the parties here is that the Joint proposal in this regard is restricted in its application to the State of Colorado, whereas Nebraska would extend the application to all three states.

In its opinion (p. 25) the Court said: "Nor will the decree interfere with relationships among Colorado's water

users. The relative rights of the appropriators are subject to Colorado's control."

There is no similar provision of the opinion in regard to either Wyoming or Nebraska. To extend such provision to Nebraska and Wyoming would not be appropriate because the decision does affect the relative rights of water users in those two states.

N.

NEBRASKA PARAGRAPH XIV (G)

The Joint proposal contains no paragraph comparable to this paragraph of the Nebraska form. The effect of the Nebraska proposal is to recognize that the Court may in the future make a determination as to the rights of the parties to the use of imported water. Importations of water to the North Platte Basin will involve water brought from the basin of the Colorado River. The use of the Colorado River water is covered by the Colorado River Compact, which does not permit the exportation of Colorado River water for use in states not within the Colorado River Basin. (See decision M-28389 of the Solicitor of the Interior Department, approved by the Secretary of the Interior April 4, 1936, Federal Reclamation Laws Annotated 1943, p. 363.) Nebraska is not within the basin of the Colorado River. Any provision of the decree which would permit the apportionment of Colorado River water to Nebraska would run contrary to the Colorado River Compact.

O.

NEBRASKA PARAGRAPH XIV (H)

The Joint proposal contains no paragraph comparable to this suggestion of Nebraska. Nebraska's proposal is objectionable because it constitutes a recognition of the right of Nebraska to divert below Tri-State Dam water originating above Tri-State Dam. This is contrary to the

finding of the Special Master (see Report, p. 9 Paragraph 5) and the opinion of the Court (see Opinion, pp. 30, 51).

Respectfully submitted,

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September 5, 1945.